UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MARGARET PERKS,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 03-186-P-S***
	)	
SCOTIA PRINCE CRUISES, LTD.,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

The defendant, Scotia Prince Cruises, Ltd., moves to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(6), or, in the alternative, for summary judgment. I recommend that the court grant the motion for summary judgment.

The motion is based on a one-year limit imposed by the terms and conditions included in the ticketing materials of the defendant. Defendant's Motion to Dismiss for Failure to State a Claim and for Summary Judgment, etc. ("Motion") (Docket No. 2) at 2-3. Rule 12(b)(6) provides for dismissal of an action for failure to state a claim upon which relief can be granted. Dismissal under this subsection of Rule 12 requires consideration of the allegations in the complaint. *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). A court may not consider any documents not expressly incorporated in the complaint in connection with a motion to dismiss; doing so will convert the motion to one for summary judgment. *Id*. An exception to this rule exists for documents that are central to the plaintiff's

claim. *Id*. In this case, the documents at issue are not incorporated in the complaint nor are they central to the plaintiff's claim. Accordingly, the court can only consider them if it takes up the motion for summary judgment. Because the motion for summary judgment has also been presented to the court, and the plaintiff has responded to it, I will proceed to consider that motion rather than the motion to dismiss.

I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.'" *Navarro v. Pfizer Corp*., 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come

forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

II. Factual Background

This court's Local Rule 56 requires a party moving for summary judgment to submit a statement of material facts as to which the party contends there is no genuine issue of material fact to be tried. Local Rule 56(b). The defendant in this case has done so. Defendant Scotia Prince Cruises Limited's Statement of Material Facts ("Defendant's SMF") (Docket No. 3). The local rule also requires the party opposing a motion for summary judgment to submit with its opposition a statement of material facts admitting, denying or qualifying the facts in the moving party's statement. Local Rule 56(c). The plaintiff, although clearly opposing the motion for summary judgment, Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss ("Opposition") (Docket No. 4) at 1, has not filed any such document.[1] Under these circumstances, the facts included in the defendant's statement are deemed admitted to the extent supported by citations to the summary judgment record. Local Rule 56(e). The following are accordingly the only facts properly before the court for consideration in connection with the motion for summary judgment.

At all relevant times, the defendant has operated the *M/S Scotia Prince* as a passenger ship between Portland, Maine and Yarmouth, Nova Scotia. Defendant's SMF ¶ 1. On May 23, 2001 the defendant issued a ticket to the plaintiff for a round-trip "Summer Getaway" package trip beginning on July 5, 2001 at 9:00 p.m. *Id.* ¶ 2. This ticket was mailed directly to the plaintiff at 10 Seward Road, Stoneham,

[1] The plaintiff has submitted two affidavits with her opposition. Those affidavits could not have been considered in connection with the motion to dismiss under Rule 12(b)(6) and cannot be considered in connection with the motion for summary judgment in the absence of a statement of material facts based on those affidavits.

Massachusetts 02180 on May 23, 2001. *Id*. ¶ 3. The defendant sent the ticket to the plaintiff in its standard ticket jacket. *Id*. ¶ 6.

The front of the ticket jacket bears the following legend:

> **IMPORTANT:**
> Each passenger should examine this ticket contract, particularly the terms and conditions of passage located on the inside of this ticket cover.

Id. ¶ 8. The terms and conditions set forth on the inside of the ticket jacket include the following:

> **EXPLANATION OF TERMS AND CONDITIONS**
>
> BY ACCEPTANCE OR USE OF THIS TICKET CONTRACT, EACH PASSENGER AND SHIPPER AGREES TO THE TERMS AND CONDITIONS APPEARING BELOW:
>
> * * *
>
> 9. TIME LIMITATION — PERSONAL INJURY — DEATH CLAIMS. The carrier shall not be liable for any claim for loss of life or personal injury unless made in writing and lodged with the carrier at the carrier's office AT PORTLAND, MAINE AND/OR YARMOUTH, NOVA SCOTIA within six (6) months from the date when the death or injury occurred.
>
> 10. TIME LIMITATIONS — SUITS. SUITS AND ACTIONS TO RECOVER FOR LOSS OF LIFE OR PERSONAL INJURY TO PASSENGERS SHALL NOT BE MAINTAINABLE UNLESS INSTITUTED WITHIN ONE (1) YEAR FROM THE DATE WHEN DEATH OR INJURY OCCURRED. SUITS AND ACTIONS TO RECOVER FOR CLAIMS OTHER THAN PERSONAL INJURIES OR LOSS OF LIFE SHALL NOT BE MAINTAINABLE UNLESS COMMENCED WITHIN SIX (6) MONTHS FROM THE DATE WHEN THE CLAIM ACCRUED OR LOSS OCCURRED.

Id. ¶ 9. In order to view the ticket, it is necessary to open the ticket jacket and see the terms and conditions. *Id*. ¶ 10.

On May 21, 2001 the defendant sent a reservation confirmation to the plaintiff at her Stoneham, Massachusetts address, setting forth all of the terms and conditions of the ticket contract. *Id*. ¶¶ 12-13.

In order to board the vessel, the plaintiff would have had to provide the vessel's personnel with the ticket sent to her by the defendant. *Id*. ¶ 16. The defendant never collects the ticket jackets, either at the ticket office or in the queue to board the vessel, or at any other time. *Id*. ¶ 15.

According to the plaintiff, she sustained an injury on board the vessel on July 5, 2001. *Id*. ¶ 17. On July 6, 2001 the plaintiff's son turned in her return ticket and sought a refund. *Id*. ¶ 18. The defendant does not ask for or take back the ticket jacket when tickets are returned for a refund. *Id*. ¶ 19. The defendant gave the plaintiff a full refund on the price of her ticket. *Id*. ¶ 20. On August 30, 2001 the defendant received a letter dated August 29, 2001 from the attorney who represents the plaintiff in this action, together with a "Notice of Claim" dated August 23, 2001 signed by the plaintiff. *Id*. ¶ 21. By letter to the attorney dated September 5, 2001 the defendant denied liability on the claim. *Id*. ¶ 22.

III. Discussion

The complaint in this case was filed on August 7, 2003. Docket. The governing statute provides, in relevant part:

> It shall be unlawful for the . . . owner of any sea-going vessel . . . transporting passengers or merchandise or property from or between ports of the United States and foreign ports to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six months, and for the institution of suits on such claims, than one year, such period for institution of suits to be computed from the day when the death or injury occurred.

46 U.S.C. App. § 183b(a). As the First Circuit has noted, "a body of case law has developed barring enforceability of [this] provision unless the steamship company has made a 'reasonable' effort to warn passengers of the restriction." *Lousararian v. Royal Caribbean Corp*., 951 F.2d 7, 8 (1st Cir. 1991) (citation omitted).

> The specific inquiry into whether a steamship company has met the standard of "reasonable communicativeness" is two-pronged. First, a court must examine the facial clarity of the ticket contract and whether its language and appearance make the relevant provisions sufficiently obvious and understandable. The second prong focuses on 'the circumstances of the passenger's possession of and familiarity with the ticket," which involves scrutiny of "any extrinsic factors indicating the passenger's ability to become meaningfully informed of the contractual terms at stake."
>
> * * *
>
> The "reasonable communicativeness" of a particular ticket in particular circumstances is a question of law and, barring a genuine dispute of material fact, the determination is appropriate for resolution at the summary judgment stage of a case.

Id. at 8-9 (citations omitted). *See also Jimenez v. Peninsular & Oriental Steam Navigation Co.*, 974 F.2d 221, 224 (1st Cir. 1992).

Here, the plaintiff does not dispute that the ticket contract meets the first of the two prongs of the test, addressing only the second prong in her argument. Opposition at 2-5. The portions of the ticket jacket and reservation confirmation quoted above appear to meet the first prong under applicable precedent, including *Muratore v. M/S Scotia Prince*, 656 F. Supp. 471, 476-77 (D. Me. 1987), and *Muratore v. M/S Scotia Prince*, 845 F.2d 347, 351 (1st Cir. 1988) (reversing the decision of this court on other grounds).

From all that appears in the statement of material facts, the second prong is met as well.

> [P]rong two's inquiry into "the passenger's possession of and familiarity with the ticket" does not depend upon *actual* knowledge of the terms in the contract of passage, but focuses instead on the *opportunity* for such knowledge.

Lousararian, 951 F.2d at 11. Here, the confirmation and the ticket jacket were sent directly to the plaintiff several weeks before she boarded the vessel. In addition, shortly after she suffered the alleged injury, she was represented by counsel, a factor "properly considered" in assessing her opportunity to become aware of the limitations period. *Id*.; *Paredes v. Princess Cruises, Inc.*, 1 F.Supp.2d 87, 90 (D.

Mass. 1998). In *Muratore*, the First Circuit held that the plaintiff had not had a sufficient opportunity under the second prong of the test because her ticket had been sent only to the agent for a tour group. 845 F.2d at 352. At the same time, the First Circuit made clear that its holding did not extend to a situation in which a passenger gives the authority to acquire and hold her ticket to a relative, friend or personal companion. *Id.* The second prong of the test is met in this case. *See, e.g., Barkin v. Norwegian Caribbean Lines*, 1988 A.M.C. 645, 1987 WL 766923 (D. Mass. June 25, 1987), at *4.

I note that the outcome would be the same were the information on which the plaintiff relies in arguing that the second prong of the test is not met properly before the court. She contends that she was not meaningfully informed of the limitation because she gave the ticket jacket to her son, who handled all of the paper work for the trip and the refund; her son spoke several times after her injury with representative of the defendant who did not advise him about the limitation; and a representative of the defendant visited her at the hospital but did not mention the limitation. Opposition at 1-3. The case law clearly establishes that a plaintiff is bound by the opportunity to become informed about the ticket terms when a relative actually receives the document which otherwise appropriately sets forth those terms. *E.g., Muratore*, 845 F.2d at 352; *Schaff v. Sun Line Cruises, Inc.*, 999 F. Supp. 924, 926 (S.D. Tex. 1998) (and cases cited therein); *Ciliberto v. Carnival Cruise Lines, Inc.*, 1986 A.M.C. 2317, 1986 WL 2560 (E.D.Pa. Feb. 25, 1986), at *3. The plaintiff cites no authority for her contention that the defendant was required to remind her of the limitation after her injury. Such a requirement would be inconsistent with *Lousararian*, in which the First Circuit held that the shipowner "reasonably could assume that plaintiff had retained her original ticket booklet and would refer to it for the details" of any limitations, particularly where she was represented by counsel. 951 F.2d at 11-12. "Indeed, the prevailing view seems to be that an injured passenger has a powerful incentive, and thus an affirmative responsibility, to become informed so long as the opportunity to

do so exists." *Id*. at 12 (citation and internal quotation marks omitted). Similarly, the plaintiff cites no authority for her contention that the fact that she was provided a refund of the purchase price of her ticket somehow relieves her of this responsibility. Such a provision of common law would, as a practical matter, prevent cruise line operators from providing refunds under most circumstances and would not be consistent with the intent of *Lousararian*.

Because the plaintiff filed this action more than one year after the alleged injury occurred, the defendant is entitled to summary judgment.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 29th day of December, 2003.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

MARGARET PERKS represented by **KENNETH D. PIERCE**
MONAGHAN, LEAHY,
HOCHADEL & LIBBY
P. O. BOX 7046 DTS
PORTLAND, ME 04112-7046
774-3906
Email: kpierce@monaghanleahy.com

V.

Defendant

SCOTIA PRINCE CRUISES LTD represented by **LEONARD W. LANGER**
TOMPKINS, CLOUGH, HIRSHON
& LANGER
THREE CANAL PLAZA
P.O. BOX 15060
PORTLAND, ME 04112-5060
207-874-6700
Email: lwlanger@tchl.com